SUPREME COURT, U. S.
JAN 2
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-825

MERCY N. CLINCHER, ET AL.,
Petitioners,

v.

THE UNITED STATES, AND THE
STATES OF ARIZONA AND MONTANA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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January, 1975

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Mercy N. Clincher, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A at 1a-8a, *infra*) is unreported. The order of the court (App. A at 9a-10a, *infra*), amending the opinion is unreported.

JURISDICTION

The judgment of the court was entered on July 19, 1974, and was amended by an order entered October 4,

1974. The jurisdiction of this Court is invoked under 25 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States is liable for amounts it withheld from the wages of federal employees for state income taxes and paid to the states where (a) the employees are American Indians; (b) the incomes were earned solely within the boundaries of Indian reservations and, as such, are not subject to state income taxation; and (c) there are no adequate state remedies.

STATUTES INVOLVED

The Buck Act, Act of July 30, 1947, ch. 389, 61 Stat. 641 (4 U.S.C. §§ 101, *et seq.*), provides in pertinent part:

> "§ 105. State, and so forth, taxation affecting federal areas; sales or use tax
>
> * * * *
>
> "106. Same; income tax
>
> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.
>
> * * * *
>
> "108. Same; jurisdiction of United States over Federal areas unaffected

"The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

"109. Same; exception of Indians

"Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

The Withholding Act, Act of July 17, 1952, ch. 940, 66 Stat. 765, as amended by the Act of September 6, 1966, ch. 55, 80 Stat. 478-79 (5 U.S.C. § 5517), provides:

"§ 5517. Withholding State income taxes

"(a) When a State statute—

"(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

"(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute *in the case of employees of the agency who are subject to the tax* and whose regular place of Federal employment is within the State with which the agreement is made. The agreement may not apply to pay for

service as a member of the armed forces. [Emphasis added]

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

"(c) For the purpose of this section, 'State' means a State or territory or possession of the United States."

STATEMENT

Petitioners are seven American Indians who are enrolled in Indian tribes recognized by the Government and who have worked for the United States on one or more Indian reservations. The Withholding Act of 1952, 5 U.S.C. § 5517, authorizes in certain instances the head of a federal agency to withhold and pay over wages of federal employees for state income taxes, but only "in the case of employees . . . who are subject to the tax. . . ." Income earned by Indians residing and working on an Indian reservation is not subject to state taxation. Buck Act, Act of July 30, 1947, 4 U.S.C. § 109; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 176-77 (1973).

The United States, however, withheld portions of the Indians' wages earned while residing and working on Indian reservations and paid the same over to various states.

The Indians sued the United States in their own behalf and on behalf of all other American Indians similarly

situated to recover the amounts so withheld from their wages. The United States interpleaded as third party defendants only two of the several states involved, Arizona and Montana. The Indians and United States each moved for summary judgment, with the United States also praying that any judgment against it be made a judgment against the two states. The states moved to dismiss.

A three-judge panel of the Court of Claims granted the motions of the United States and the states and dismissed the case, holding the Indians had no claim for relief.

The Indians moved for a rehearing *en banc*. The court modified its opinion, but denied the motion by order dated October 4, 1974.[1]

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Claims undercuts the decision of this Court in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

In *McClanahan*, this Court held that state tax laws do not extend to Indians on reservations. In doing so, the Court reaffirmed that Congress, in 1947, by enacting the Buck Act, 4 U.S.C. §§ 101, *et seq.*, continued to protect reservation Indians from the taxing jurisdiction of the states.

Section 109 of the Buck Act provides:

> "Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

This Court said in *McClanahan*, *supra*, at 176-77:

---

[1] App. A at 9a-10a, *infra*.

"Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § 104 *et seq.*, which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106(a) of Title 4 U.S.C. grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that "[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." To be sure, the language of the statute itself does not make clear whether the reference to "any Indian not otherwise taxed" was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4 (1940); 84 Cong. Rec. 10685, and this Court has so interpreted it. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. at 691 n. 18. While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." (Footnote omitted)

As the Court noted, it previously had affirmed the exemption of reservation Indians from state taxation in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965). In that connection, the Court observed:

> "The Buck Act, now 4 U.S.C. §§ 105-110 (1964 ed.), in which Congress permitted States to levy sales or use taxes within certain federal areas, has been interpreted by what appears to be the only court to consider the question before this case, and by the Interior Department, as not applying to Indian reservations. *Your Food Stores, Inc.* v. *Village of Espanola*, 68 N. M. 327, 334, 361 P. 2d 950, 955-956; 58 I.D. 562. Cf. 4 U.S.C. § 109 (1964 ed.), excepting taxes on Indians from the scope of the Act. We think that interpretation was correct. See S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 3." (380 U.S. at 691 n.18)

This case is the only practical way that *McClanahan* can be given meaning for the years that the United States took its Indian employees' wages and turned them over to the states for income taxes. But the Court of Claims refused to give life to *McClanahan*. Indeed, the Court of Claims totally ignored the critical statute, the Buck Act, and treated the matter as if the Indian employees were subject to state taxes and this was simply another case of taxpayers pursuing state remedies to obtain a refund.

2. This case presents an important question of general application to a substantial segment of American Indians.

The petitioners and the class they represent[2] constitute a substantial segment of working American Indians. Because of their minority status and their special relationship to the United States, the Government has conferred on them a preferential right of employment in the Bureau of Indian Affairs. This policy has been in force at least as far back as 1834. *Morton* v. *Mancari*, 42 U.S.L.W. 4933 (June 17, 1974).

---

[2] The decision may have been influenced by the fact this was a class action. Whether this case was a proper class action was never litigated below.

The decision below, by sanctioning the Government's withholding of the Indians' wages, cannot be reconciled with the Congressional policy of preferential right of employment and the Indians' federal right to be free from state jurisdiction, including state tax laws.

3. The decision below is clearly erroneous.

A. The decision of the Court of Claims ignores the Buck Act and misapplies the Withholding Act.

The Court of Claims, in reaching its decision, ignored the Buck Act, the controlling federal statute. Further, the Court compounded its error by erroneously applying the Withholding Act of 1952 to federal Indian employees on reservations. The Court concluded "[w]hat we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state." (App. A at 7a, *infra.*)

This is not a case of taxpayers seeking a refund of excess taxes withheld. Here the Indians seek recovery of their wages wrongfully withheld by the United States and paid to third parties in violation of a federal statute. Had the United States withheld the Indians' wages and retained them, rather than turning them over to third parties, the Indians would be entitled to recover in the Court of Claims. The United States cannot escape its liability from wrongful conduct by a Pontius Pilate act of turning over the Indians' wages to third parties. Yet this is the result reached by the Court of Claims, and to reach that result the Court of Claims ignored the very statute designed to protect reservation Indians from state taxation.

B. *The Court of Claims erred when it relegated reservation Indians to state jurisdiction.*

Most states impose a three-year statute of limitations. By directing the Indians to state courts, the court below, for all practical purposes, deprived them of a remedy provided by the six-year statute of limitations in the Court of Claims (28 U.S.C. § 2501). Thus, this suit is essential in order for the Indians to obtain the compensation they earned and which the United States took for the excess time period by which the Court of Claims' six-year statute of limitations exceeds state statutes of limitations.

The decision below also would compel a multiplicity of suits in a number of states—a result to be avoided. In addition, an extra burden is cast on a substantial segment of the class that has worked on reservations in more than one state. As with other federal employees, a number of petitioners, and other Indian employees similarly situated, have been transferred from reservation to reservation in different states during the course of their employment. The effect of the Court of Claims' holding is to compel numerous Indians, each for himself, to initiate suits in more than one state. The time, expense and human effort necessary to pursue this sort of piecemeal justice represents a totally unconscionable burden, especially when placed upon the innocent but aggrieved party.

Further, the individual amounts involved in this suit are small and are far outweighed by the attorneys' or accountants' fees and litigation costs necessary to sustain individual refund actions.[8]

---

[8] The Court of Appeals for the District of Columbia noted that "[i]n 1970 only a little more than half of all employees [of the Bureau of Indian Affairs] were Indians and the majority of these were employed in the lower ranking jobs." *Freeman* v. *Morton*, 499 F.2d 494, 501 n.20 (D.C. Cir. 1974).

Finally, at least with one state, Montana, its procedures are discriminatorily applied to Indians. Montana has a five-year statute of limitations. Rev. Code Mont. § 84-4956 (1947). However, at oral argument before the Court of Claims, Montana counsel informed the court that in the case of reservation Indians, the state tax department arbitrarily imposes a three-year limitation. In addition, Montana counsel informed the court that it permitted refunds under this shortened period only if the Indian seeking the refund was also enrolled on the reservation where he earned his wages. (*See* App. B at 11a-12a, *infra*).

It is precisely this sort of discriminatory treatment by states which emphasizes the continuing need for the special relationship between Indians and the United States and why the federal government retains jurisdiction to the exclusion of states.

The decision below is in total conflict with federal law and policy and results in giving Indian wages to states.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Claims in *Clincher v. United States*, No. 25-73 (July 19, 1974).

Respectfully submitted,

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January, 1975

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 25-73

(Decided July 19, 1974)

MERCY N. CLINCHER, ET AL.,

v.

THE UNITED STATES; STATES OF MONTANA AND ARIZONA,
Third Party Defendants

Marvin J. Sonosky, for plaintiffs. *Richard A. Baenen*, attorney of record for plaintiffs.

David W. Miller, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

Robert W. Corcoran, with whom was *Edward Jene Bell*, of counsel, for the State of Montana.

James D. Winter, with whom was *Gary K. Nelson*, of counsel, for the State of Arizona.

Before SKELTON, NICHOLS, and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT; AND THIRD PARTY DEFENDANT'S MOTIONS TO DISMISS

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiffs are seven American Indians who are, or have been, United States employees on Indian reservations. Invoking *McClanahan* v. *Arizona State Tax Comm.*, 411 U.S. 164 (1973), they bring this suit to recover amounts withheld from their wages by the United States for state income taxes and paid over to either the State of Montana or the State of Arizona. They did not protest the withholdings, which ceased after *McClanahan*, and they have not requested refunds under state practice. Pursuit to Rule 41, Montana and Arizona have been added to the suit as third party defendants. The United States moves for summary judgment. Also it prays for judgment against these third party defendants in the amount of any judgment that may be entered in the plaintiffs' favor against the United States. Arizona and Montana have filed motions to dismiss plaintiffs' petition. We have subject matter jurisdiction pursuant to 28 U.S.C. § 1491, since the plaintiffs are suing for amounts due them as pay earned during their United States Government employment. *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F.2d 754 (1972).

Plaintiffs ask that this case be certified as a class action or form of a class action. In the alternative they have filed a motion for leave to add 15 additional parties plaintiff, all of whom are employed by the United States on Indian reservations not within the boundaries of Arizona or Montana.

In the recent case of *Quinault Allottee Ass'n* v. *United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972), 14 A.L.R. Fed. 751, we held that we have the power to entertain class actions. In that case we decided not to adopt a rule complementary to Rule 23 of the Federal Rules of Civil Procedure. Recognizing that F.R.C.P. 23 is controversial, and that our needs are unlike those of the District Courts, we decided in *Quinault*, to handle class actions on a case

by case basis, deferring promulgation of a rule of our own. *See, also,* Annot., *"Maintenance of Class Actions In United States Court of Claims"*, 14 A.L.R. Fed. 760 (1973); Iadarola, *Class Suits And The Court of Claims—Is The Court Now Ready For A Rule*, 31 Fed. B.J. 225 (1972).

It is certainly fairer to the members of the class not to invite them on board a sinking ship, as this, we hold *infra*, is. Moreover, the class, according to plaintiffs, numbers about 7,000, employed on different reservations in several different states. It appears to be common ground that liability, if any, of the United States passes through to the third party defendants. Should we hold, as we do not, that the United States can be initially liable as a stakeholder who paid the wrong party, the paramount issues would then become the liability of each individual state in light of relevant treaties and statutes. *McClanahan, supra*, at 173. Issues might be different for different states, and for different tribes or reservations in the same state. Attorneys General of different states might employ different strategy. Thus the class action as proposed would be an unwieldly mass with the single common initial issue outweighed by a multiplicity of subsequent diverse issues. *Quinault, supra*. The normal and presently ongoing pursuit of refund claims before state agencies and courts appears cleaner, simpler, and more economical. The request for class action status is denied.

For the same reason we also deny plaintiffs' motion to add additional parties plaintiff. Such motion seeks to add individuals from Oregon, Idaho, South Dakota, California and Colorado. If we granted this motion the United States asks that we add the states listed above as third party defendants prior to ruling on the merits. Undoubtedly, these states would want to express their views to this court. This would unnecessarily complicate

and delay the present litigation. As stated, we perceive no assurance that the legal issues will be the same for other states as they are for Arizona and Montana.

The test case, brought by one or a few plaintiffs, has been the traditional method of litigating rights of Government employees in this court. We see no reason why the method is not sufficient here.

The plaintiff, *McClanahan*, was a Navajo Indian who resided on, and derived all her income from within the Navajo reservation. She sued in the state courts to recover $16.20 withheld from her wages as Arizona State income taxes, and losing there, went to the United States Supreme Court. Relying upon Federal statutes, and a treaty between the United States and the Navajos, the Supreme Court held that Arizona was without jurisdiction to tax her income earned on the reservation.

Plaintiffs argue that where the United States owes money to one party but mistakenly pays it to another party, the first party is entitled to recover those sums from the United States. Cited as authority are *Fireman's Fund Ins. Co.* v. *United States*, 190 Ct. Cl. 804, 421 F.2d 706 (1970); *Stamer* v. *United States*, 148 Ct. Cl. 482 (1960) and *Central Nat'l Bank of Richmond* v. *United States*, 117 Ct. Cl. 389, 91 F. Supp. 738 (1950). These cases are not relevant to the case at bar, since none concerns the situation where the United States as an employer, withholds state income taxes. No case has been cited to us, nor have we been able to find any cases holding that an employer is liable to its employee for income taxes erroneously withheld from the employee's wages. Looking the other way, but not directly in point, is *Lung* v. *O'Cheskey*, 358 F. Supp. 928 (D.N. Mex., (3 judge court)), *aff'd* 414 U.S. 802 (1973).

The United States withholds state income taxes from its employees as a result of contracts entered into with

states pursuant to 5 U.S.C. § 5517. In relevant part that statute provides as follows:

§ 5517. WITHHOLDING STATE INCOME TAXES

(a) When a State statute—

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. * * *

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

We are certain that Congress could not have intended this provision to be interpreted so as to impose a greater burden on the United States than that imposed on a

private employer. This is evident from subsection (b) of the statute.

We hold that the United States is not liable to its Arizona and Montana Indian employees for state income taxes erroneously withheld from their salaries because a private employer would not be under either Arizona or Montana law. Such liability is expressly eliminated by Ariz. Rev. Statutes § 43-188(g), and Rev. Codes of Montana § 84-4947:

Ariz. Rev. Statutes, § 43-188

(g) Liability for failure to withhold; penalty for failure to remit.

(1) The employer shall be liable to the tax commission for the payment of the tax required to be deducted and withheld under this section, and the employee shall not thereafter be liable for the amount of any such payment, *nor shall the employer be liable to any person or any employee for the amount of any such payment.* For the purpose of making penalty sections of this title applicable, any amount deducted or required to be deducted and remitted to the commission under this section shall be considered the tax of the employer and with respect to such amounts he shall be considered as a taxpayer. (Emphasis supplied.)

Rev. Code of Montana, § 84-4947

84-4947. Amount withheld considered as tax collected. All amounts deducted and withheld shall be considered as a tax collected under the provisions of this act, and *no employee shall have any right of action against his employer in respect to any moneys so deducted and withheld from his wages* and paid to the state of Montana in compliance or intended compliance with this act. (Emphasis supplied.)

These provisions are apparently patterned after I.R.C. of 1954, § 3403, or its predecessor I.R.C. of 1939, § 1623. The former is set out below:

Internal Revenue Code, 1954, § 3403

SEC. 3403. LIABILITY FOR TAX.

> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and *shall not be liable to any person for the amount of any such payment.* (Emphasis supplied.)

Arizona also provides that a taxpayer, from whose pay sums are withheld, has the same remedies as other taxpayers § 43-188(i). This appears to be implicit as to Montana. At any rate, in this court it was not denied that the involved Indians had available to them the customary and usual remedies to recover state income taxes withheld contrary to *McClanahan*, to the extent state statutes of limitations have not run. Both states are actively processing refund claims based on *McClanahan*, though the position of Montana, not yet tested administratively, or in its courts, is to deny *McClanahan* full retroactive effect.

Should there be any state that expressly or by implication imposes upon the private employer the duty to monitor the tax liability of its employees, and refrain from any withholding contrary to correct views as to the employee's tax liability, whether or not the employee has so requested, that would present us with a situation not before us here, and one as to which we express no opinion. What we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state. The plaintiffs are not incompetent. As their counsel admitted, there is nothing in their claims, if valid, that would not be equally valid for any non-Indian Govern-

ment employee, if despite some legal immunity from state taxation, the Government withheld moneys and paid them over to the state in error as state taxes.

Plaintiffs' cause of action is also barred by their failure to exhaust state administrative remedies. In both states a taxpayer is required to file a claim for refund with a state administrative taxing authority. Ariz. Rev. Statutes § 43-184(b)(1); Rev. Codes of Montana § 84-4956. A condition to a taxpayer's obtaining judicial review in both states is *inter alia* a denial of the taxpayer's claim for refund by the administrative taxing authority. Ariz. Rev. Statutes §§ 43-184(b)(1), 43-186(b); Rev. Codes of Montana §§ 84-4922, 84-4923.1. Plaintiffs apparently have never filed a claim for a refund with either of the state taxing authorities. This precludes our granting them any relief since in the absence of a statutory exception a litigant must exhaust state administrative remedies prior to challenging a state action in a Federal court. *Gilchrist* v. *Interborough Rapid Transit*, 279 U.S. 159 (1929); *Porter* v. *Investors Syndicate*, 286 U.S. 461 (1932), *aff'd on rehearing*, 287 U.S. 346 (1932); *Carson* v. *Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *Baron* v. *O'Sullivan*, 258 F.2d 336 (3d Cir. 1958).

We therefore grant the United States' motion for summary judgment, and third party defendants', States of Arizona and Montana, motions to dismiss. The plaintiffs' motion for summary judgment is denied. The petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 25-73

MERCY N. CLINCHER, ET AL.

v.

THE UNITED STATES;
STATES OF MONTANA AND
ARIZONA, THIRD PARTY DEFENDANTS

Before SKELTON, *Judge*, Presiding, NICHOLS AND KASHIWA, *Judges*.

ORDER

This case comes before the court on plaintiffs' motion, filed August 9, 1974, pursuant to Rules 151 and 7(d), for rehearing and suggestion for rehearing *en banc*. Upon consideration thereof, together with the responses in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d) which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

IT IS FURTHER ORDERED that the slip opinion entered herein on July 19, 1974, be and the same is corrected and amended as follows:

1. The sentence beginning the paragraph on lines 29 and 30 of page 6 of the said slip opinion reading.

"Plaintiffs' cause of action is also barred by their failure to exhaust state administrative remedies." is deleted and the following sentence is inserted in lieu thereof:

> Plaintiffs' proper remedy is to follow the administrative procedures prescribed by the two states.

2. The sentences starting with the words, "This precludes our granting them * * *", appearing on lines 39 and 40 of page 6 of the said slip opinion, and continuing through line 8 of page 7 thereof (ending with the citation of *Baron* v. *O'Sullivan*), are deleted and stricken.

BY THE COURT

/s/ Byron Skelton
Byron Skelton
Judge, Presiding

Oct. 4, 1974

APPENDIX B

[SEAL]

STATE OF MONTANA

DEPARTMENT OF REVENUE

Mitchell Building

Helena, Montana 59601

June 12, 1974

Clifford Young Bear
Brockton
Montana 59213

SS 501-32-2833

Re: I.T. 1973—Tax Due	$63.43
Interest	.95
TOTAL DUE	$64.38

Dear Mr. Young Bear:

We acknowledge receipt of your 1972 amended return and your earning statement for 1973.

In order to be exempt from taxation you must meet the following criteria.

1. Be an enrolled member of a tribe.
2. Live and work within the exterior boundaries of the same tribal reservation of which you are an enrolled member.

Since Mr. Young Bear is enrolled by the Fort Berthold Agency and working on the Fort Peck Reservation, he is taxable on his entire income.

We have prepared a return in his behalf which reflects a tax due of $64.38. We have also prepared a return for Mrs. Young Bear which reflects a refund of $41.30 which she will receive in the near future.

We are unable to complete the audit of your 1972 return until we receive your earning statement to substantiate the $241.83 withheld.

Please attach your remittance and requested earning statement to the enclosed copy of this letter and return to this office within the next thirty (30) days.

Very truly yours,

DEPARTMENT OF REVENUE

/s/ Ruth O. Rowlan
Ruth O. Rowlan, Auditor
Income Tax Bureau

ROR:drs